A

MAD ROZI CHE DIN

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
MOHAMED APANDI ALI JCA
AZAHAR MOHAMED JCA
BALIA YUSOF WAHI JCA
[CRIMINAL APPEAL NO: R-05-137-2010]

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16 MAY 2013

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Conviction and sentence - Appeal against - Drugs found hidden in lorry - Whether evidence of accused to customs*

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officer admissible - Whether accused under arrest at time of making confession - Whether caution under s. 37A Dangerous Drugs Act 1952 administered - Knowledge of drugs - Whether there was maximum evaluation of evidence - Whether conviction safe - Customs Act 1967, ss. 101, 111

E

EVIDENCE: *Admissibility - Confession - Accused admitted carrying drugs to customs officer - Whether accused under arrest at time of making confession - Whether need to administer caution under s. 37A Dangerous Drugs Act 1952 only arises after actual arrest*

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The appellant was charged and tried before the High Court for trafficking in 53,074.47g of dangerous drugs, namely cannabis, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). The appellant was the driver of a lorry that was scanned at the scanning machine at the Immigration Complex, Padang

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Besar. The front portion of the lorry was found to contain suspicious images. Thereafter, there were exchanges between the appellant and a customs officer ('SP6') and it was at this point, according to SP6, that the appellant admitted to him that he was carrying 'ganja'. The lorry was then subjected to further

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investigation and after a thorough search, five plastic bags containing compressed slabs of dried leaves were found hidden in between the boxes in the cargo compartment. The contents of the five bags were confirmed by the chemist to be cannabis. The Judicial Commissioner ('JC') made a finding that the appellant was

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in actual possession of the dangerous drugs in question and as the weight of the cannabis was more than 200g, he invoked the

presumption of trafficking under s. 37(da) of the DDA. The appellant, in his defence, denied any knowledge of the presence of drugs hidden in the lorry driven by him. At the conclusion of the trial, the JC held that the appellant failed to raise a reasonable doubt on the prosecution's case. The appellant was thus convicted and sentenced to death. The appellant raised two principal grounds in support of the appeal herein (i) whether SP6's evidence that the appellant had admitted to him that he was carrying "ganja" was inadmissible for the reason that at the time it was uttered, no caution under s. 37A of the DDA was administered, despite the fact that the appellant was at that time under arrest; and (ii) whether the JC had failed to conduct maximum evaluation of the evidence of SP10 who had identified the appellant as the driver of the lorry.

Held (dismissing appeal; affirming conviction and sentence of death)

Per Azahar Mohamed JCA delivering the judgment of the court:

(1) SP6 had detained ('menahan') the appellant to make inquiries and to scan the lorry based on the information received. At that point in time, SP6 had no knowledge that the appellant was transporting the offending cannabis. In the context of the present case, the word "menahan" used by SP6 simply meant to make inquiries and to carry out a search on the lorry, as he was permitted to do so under the provisions of ss. 101 and 111 of the Customs Act 1967 (*PP v. David Ackownah Bonsu*, refd). That being the case, the appellant was not under arrest the moment SP6 "menahan" the appellant prior to the discovery of the five plastic bags of cannabis. The need to administer the caution under s. 37A of the DDA only arises after actual arrest and not constructive arrest (*PP v. Lim Hock Boon*, refd). Given that the appellant at the time he made the statement was not yet under arrest, his statement that he was carrying "ganja" was therefore admissible in evidence. (paras 11, 12 & 13)

(2) The JC had considered and judicially appreciated the points raised by learned counsel before coming to a definite finding of fact that the appellant had complete custody, control and responsibility over the lorry and that the appellant had the required knowledge about the cannabis found hidden in the cargo compartment of the lorry. Moreover, the defence never

suggested to SP10 that a third party could have placed the offending drugs in between the boxes in the cargo compartment of the lorry, without the knowledge of the appellant. The totality of the evidence and the surrounding circumstances when taken together, irresistibly pointed to the appellant having knowledge of the offending cannabis contained in the five plastic bags, which were hidden in between boxes in the cargo compartment of the lorry at the material time. Thus, the conviction of the appellant was a safe one. (paras 15, 16, 18 & 19)

Bahasa Malaysia *Translation Of Headnote*

Perayu telah dituduh dan dibicarakan di Mahkamah Tinggi atas kesalahan pengedaran 53,074.47g dadah berbahaya, iaitu kanabis, satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Perayu adalah pemandu lori yang telah diimbas melalui mesin pengimbas di Kompleks Imigresen, Padang Besar. Bahagian depan lori menunjukkan imej-imej yang mencurigakan. Kemudiannya, terdapat perbualan antara perayu dan pegawai kastam ('SP6') dan pada ketika itu, menurut SP6, perayu mengaku kepadanya bahawa perayu membawa 'ganja'. Lori tersebut kemudiannya disiasat secara lanjut dan selepas carian menyeluruh, lima beg plastik yang mengandungi papak mampat daun kering dijumpai tersembunyi antara kotak-kotak di ruang kargo. Isi kandungan kelima-lima beg disahkan oleh ahli kimia sebagai kanabis. Pesuruhjaya Kehakiman ('PK') telah membuat dapatan bahawa perayu mempunyai milikan ke atas dadah-dadah berbahaya tersebut dan oleh kerana berat kanabis adalah lebih daripada 200g, beliau membangkitkan anggapan pengedaran di bawah s. 37(da) ADB. Perayu, dalam pembelaannya, menafikan apa-apa pengetahuan berkenaan kehadiran dadah-dadah tersebut yang tersembunyi dalam lori yang dipandunya. Di akhir perbicaraan, PK memutuskan bahawa perayu telah gagal membangkitkan keraguan munasabah ke atas kes pihak pendakwaan. Oleh itu, perayu disabitkan dan dijatuhkan hukuman mati. Perayu membangkitkan dua alasan utama untuk menyokong rayuan ini: (i) sama ada keterangan SP6 bahawa perayu telah mengaku kepadanya yang perayu sedang membawa 'ganja' tidak boleh diterima atas sebab bahawa pada masa ia dilafazkan, tiada amaran diberikan di bawah s. 37A ADB, walaupun perayu pada masa itu telah ditahan; dan (ii) sama ada PK telah gagal melaksanakan penilaian maksimum ke atas keterangan SP10 yang telah mengenal pasti perayu sebagai pemandu lori tersebut.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman mati)
Oleh Azahar Mohamed HMR menyampaikan penghakiman mahkamah:

(1) SP6 telah 'menahan' perayu untuk membuat siasatan dan untuk mengimbas lori tersebut berdasarkan maklumat yang telah diterima. Pada masa itu, SP6 tidak mempunyai pengetahuan bahawa perayu sedang mengangkut kanabis tersebut. Dalam konteks kes ini, perkataan "menahan" yang digunakan oleh SP6 hanya bermaksud untuk membuat membuat siasatan dan menjalankan carian ke atas lori tersebut, seperti yang dibenarkan untuk SP6 berbuat demikian di bawah peruntukan ss. 101 dan 111 Akta Kastam 1967 (*PP v. David Ackownah Bonsu*, dirujuk). Perayu bukan ditangkap ketika SP6 'menahan' perayu sebelum penemuan lima beg plastik kanabis. Keperluan untuk memberikan amaran di bawah s. 37A ADB hanya berbangkit selepas penangkapan sebenar dan bukan penangkapan secara konstruktif (*PP v. Lim Hock Boon*, dirujuk). Oleh kerana perayu belum lagi ditangkap pada masa perayu membuat pernyataan, pernyataan bahawa perayu membawa "ganja" boleh diterima sebagai keterangan.

(2) PK telah mempertimbangkan dan menilai hujah-hujah yang dibangkitkan oleh peguam di sisi undang-undang sebelum membuat penemuan muktamad fakta bahawa perayu mempunyai jagaan, kawalan dan tanggungjawab sepenuhnya ke atas lori tersebut dan bahawa perayu mempunyai pengetahuan berkenaan kanabis yang dijumpai tersembunyi di dalam ruang kargo lori itu. Tambahan lagi, pembelaan tidak pun mencadangkan kepada SP1 bahawa kemungkinan terdapat pihak ketiga yang meletakkan dadah berbahaya tersebut antara kotak-kotak di ruang kargo lori tersebut, tanpa pengetahuan perayu. Keseluruhan keterangan dan keadaan sekeliling apabila dipertimbangkan bersama-sama menunjukkan bahawa perayu mempunyai pengetahuan berkenaan kanabis tersebut yang terkandung dalam lima plastik beg, yang tersembunyi antara kotak-kotak di dalam ruang kargo lori pada waktu material. Oleh itu, sabitan dan hukuman perayu adalah selamat.

Case(s) referred to:
PP v. David Ackowuah Bonsu [1999] 2 CLJ 677 HC ***(refd)***
PP v. Lim Hock Boon [2009] 3 CLJ 430 FC ***(refd)***

Legislation referred to:
Customs Act 1967, ss. 101, 111
Dangerous Drugs Act 1952, ss. 37(da), 37A, 39B(2)

For the appellant - Hisham Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Aslinda Ahad; DPP

[Editor's note: For the High Court judgment, please see PP lwn. Mad Rozi Che Din [2010] 1 LNS 378]

Reported by Suhainah Wahiduddin

JUDGMENT

Azahar Mohamed JCA:

[1] Mad Rozi bin Che Din ("the appellant") was charged and tried before the Kangar High Court for trafficking in 53,074.47g of dangerous drugs, namely cannabis, an offence under s. 39B(2) of the Dangerous Drugs Act 1952 ("DDA"), and punishable under s. 39B(2) of the DDA. The offence was said to have been committed on 29 December 2004 at about 8.40pm at 'Stor Pencegahan Padang Besar Taman Kastam Dua', in the district of Padang Besar, in the State of Perlis.

[2] The learned Judicial Commissioner ("JC") at the conclusion of the trial convicted the appellant and sentenced him to the mandatory death penalty prescribed by the DDA. The appellant then appealed to this court. We heard his appeal, wherein at its conclusion we unanimously dismissed it. We affirmed the conviction and sentence. We now give our reasons for dismissing the appeal.

[3] The learned JC had well set out in his judgment the facts of the case and the salient evidence which he held made out a *prima facie* case against the appellant. Very briefly, the pertinent facts are these. Indera bin Idris ("SP7") is a customs officer attached to the Customs Narcotic Unit. On 29 December 2004 at about 4.30pm, acting on information received, SP7 carried out

surveillance on lorry No. KX 8026 at the Immigration Complex, Padang Besar. He noticed the target lorry parked at the Custom's Gate Pass of the Immigration Complex. He then saw the lorry being driven to a spot and then it stopped. The appellant was the driver of the lorry and he was alone in the lorry. The appellant then came out from the lorry and proceeded towards the customs office. Subsequently, another customs officer, Hesley bin Ahmad ("SP6") prevented the lorry from being driven away. He instructed the lorry to be scanned at the scanning machine that was being manned by customs officer Roslan bin Aziz ("SP4"). After the lorry was scanned through the machine, SP4 found that the front portion of the lorry contained some suspicious images. Thereafter the appellant was directed by SP6 to open the 'kain tarpan' of the lorry but he refused. Next, there were exchanges between SP6 and the appellant. It was at this point, according to SP6, the appellant admitted to him that he was carrying 'ganja'. In this regard, the material part of the evidence of SP6 is as follows:

> Saya kemudiannya mengarahkan Orang Kena Tuduh membuka kain tarpan lori tersebut untuk membolehkan saya melakukan pemeriksaan tetapi Orang Kena Tuduh enggan membuka kain tarpan tersebut dan mengajak saya berbincang. Saya bertanya kepada Orang Kena Tuduh "apa sebenarnya yang beliau bawa di bahagian hadapan muatan kargo lori". Orang Kena Tuduh telah memberitahu kepada saya dia "membawa mercun". Saya tetap mengarahkan Orang Kena Tuduh membuka kain tarpan lorinya untuk saya periksa. Orang Kena Tuduh sekali lagi minta berbincang dengan saya dan dengan En. Indera. Saya pun sekali lagi bertanya kepada Orang Kena Tuduh "apa sebenarnya muatan yang dia bawa". Orang Kena Tuduh kemudiannya mengaku kepada saya dan En. Indra yang beliau membawa ganja. Sebaik mendengar pengakuan Orang Kena Tuduh, saya minta En. Indra menangkap Orang Kena Tuduh dan menggarinya.

[4] The said lorry was subsequently taken to 'Stor Pencegahan Padang Besar Taman Kastam Dua' for further investigation. It was there, after the lorry was thoroughly searched, SP6 and SP7 found five plastic bags containing compressed slabs of dried leaves, suspected to be cannabis, which were hidden in between the boxes in the cargo compartment.

[5] The five plastic bags were later sent to the Chemistry Department for chemical examination and analysis. The contents of the five bags were later confirmed by the chemist, Khairuzzaman bin Mustafa (SP3) to be 53,074.47g of cannabis.

[6] After conclusion of the case for the prosecution, the learned JC came to the finding that the prosecution had made out a *prima facie* case against the appellant. The learned JC made a finding that the appellant was in actual possession of the dangerous drugs in question and as the weight of the cannabis was more than 200g, he invoked the presumption of trafficking under s. 37(da) of the DDA. The learned JC then called upon the appellant to enter his defence. The appellant elected to give sworn evidence. The appellant denied any knowledge of the presence of drugs hidden in the lorry driven by him.

[7] At the conclusion of the trial, on the totality of the evidence, the learned JC came to the conclusion that the appellant failed to raise a reasonable doubt on the prosecution's case and failed to rebut the presumption of trafficking under s. 37(da) of the DDA on a balance of probabilities. As indicated earlier, the appellant was convicted of the offence and sentenced accordingly.

[8] Before us, learned counsel for the appellant raised two principal grounds in support of this appeal.

[9] First, learned counsel argued that the appellant's confessional statement to SP6 must be excluded. It will be recalled that SP6 said in evidence that the appellant admitted to him that he was carrying "ganja". Learned counsel argued that the statement, which we have highlighted earlier in the judgment, was inadmissible for the reason that at the time it was uttered, no caution under s. 37A of the DDA was administered, despite the fact that the appellant was at that time under arrest. He brought to our attention the following parts of the evidence of SP6 at p. 126 of the appeal record vol. 1:

> S : Dalam keterangan awal yang lepas, awak mengatakan "sebaik sahaja lori tersebut hendak bergerak keluar, saya terus menahan lori tersebut", tolong jelaskan maksud keterangan awal ini.
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> J : Saya menahan OKT sebaik sahaja OKT menghampiri lorinya dan ketika OKT cuba bawa keluar lori dari Unit Dagangan Jalan Raya. Masa ini OKT belum lagi masuk ke dalam lori tetapi dalam proses untuk membuka pintu lori sebelah pemandu.

[10] We were unable to agree with this submission. In our judgment, the issue of admissibility of the appellant's statement to SP6 to the effect that he was carrying 'ganja' was wholly decided by the learned JC on the facts and the prevailing circumstances of the case, based on the credibility of the witnesses and the inherent probabilities of their testimonies. To address this issue, as a starting point, the relevant statutory provisions of the Customs Act 1967 ("1967 Act") are reproduced herein.

Section 101:

> Every person required by the proper officer of customs to give information or produce any documents on any subject into which it is such officer's duty to enquire under this Act and which it is in such person's power to give shall be legally bound to give such information or produce such documents.

Section 111:

> (1) The person in charge or in control of any vehicle arriving at a prescribed place of import and export shall, on arrival at such place, produce his vehicle to the proper officer of customs, and shall, if so required, move his vehicle to another place for examination, and shall not proceed until permission to do so has been given by the proper officer of customs.
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> (2) Any officer of customs may stop and examine any vehicle for the purpose of ascertaining whether any uncustomed or prohibited goods are contained therein, and the person in control or in charge of such vehicle shall if required so to do by such officer, stop such vehicle and allow such officer to examine the same.
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> (3) The person in control or in charge of any vehicle examined under this section shall on request by the proper officer of customs open all parts of the vehicle for examination by such officers and take all measures necessary to enable such examination as such officer considers necessary to be made.

[11] In our view, in the context of the present case, the word 'menahan' used by SP6 simply means to make inquiries and to carry out a search on the lorry, based on the information received, as he was permitted to do so under the provisions of ss. 101 and 111 of the 1967 Act (see: *PP v. David Ackowuah Bonsu* [1999] 2

A CLJ 677). It is important to note that at that point of time, SP6 had no knowledge that the appellant was transporting the offending cannabis. SP6 'menahan' the appellant to make inquiries and to scan the lorry based on the information received. That being the case, we do not agree with the arguments of learned B counsel that the appellant was under arrest the moment SP6 'menahan' the appellant prior to the discovery of the five plastic bags (which was later confirmed to contain cannabis), which were hidden in between boxes in the cargo compartment of the lorry.

C **[12]** The need to administer the caution under s. 37A of the DDA only arises after actual arrest and not constructive arrest (see: *PP v. Lim Hock Boon* [2009] 3 CLJ 430; [2009] 3 MLJ 604). In this regard, in his judgment the learned JC said:

> D Di dalam kes ini, SP6 telah meminta OKT untuk membuka kain tarpan bagi membolehkan beliau melakukan pemeriksaan. Tindakan ini adalah selaras dengan peruntukan di bawah ss. 101, 111, 113 Akta Kastam 1967 yang membenarkan pertanyaan dibuat dan pemeriksaan dilakukan. Pada ketika itu tidak ada apa-apa kesalahan dilakukan oleh OKT kecuali terdapat syak wasangka berdasarkan E dua imej yang berbeza dalam gambar imej, P143.
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> Atas permintaan SP6 itu, OKT enggan membukanya tetapi di sebaliknya mengajak SP6 untuk berbincang. Lalu SP6 terus bertanya "apa sebenarnya yang beliau bawa di bahagian hadapan muatan kargo lori". OKT menjawab dia membawa "mercun". SP6 F tidak berpuas hati dan tetap mengarahkan OKT membuka kain tarpan lori tersebut. OKT masih lagi enggan membuka kain tarpan dan mengajak SP6 dan SP7 berbincang. SP6 bertanya lagi "apa sebenarnya muatan yang dia bawa". Lalu OKT membuat pengakuan kepada SP6 dan SP7 dia membawa ganja. Mendengar G sahaja jawapan OKT ini, OKT telah ditangkap dengan menggari tangannya.
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> Pertanyaan oleh SP6 dibuat selaras dengan kuasa yang dibenarkan oleh peruntukan ss. 101, 111 dan 113 Akta Kastam 1967 iaitu tindakan menahan, membuat pertanyaan dan melakukan H pemeriksaan. Pada ketika itu, OKT belum lagi ditangkap bagi tujuan s. 37A Akta Dadah Berbahaya. OKT hanya ditangkap oleh SP7 secara digari selepas OKT memberitahu dia "membawa ganja" bagi menjawab pertanyaan SP6. Jawapan OKT kepada pertanyaan SP6 adalah admissible.

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[13] In our judgment, on consideration of the evidence before us, there was more than sufficient admissible evidence to support the learned JC's findings. In our view, there was no error made by the learned JC, warranting appellate intervention. Given that the appellant at the time he made the statement was not yet under arrest, his statement that he was carrying 'ganja' was therefore admissible in evidence.

[14] Finally, we now turn to consider the appellant's complaint that the learned JC failed to conduct maximum evaluation of the evidence. In the trial before the learned JC, the prosecution called, among others, Yusob Namyuri ("SP10") to show that it was the appellant who was responsible for the presence of the five plastic bags in the lorry. SP10 was in charge of loading the boxes into the lorry. His duty was to load/unload cargo from lorry. His place of job was at Padang Besar at the Thailand side. He has his superior by the name of "Li". According to SP10, on 29 December 2004 he worked as usual. On that day his duty was to unload boxes containing 'bihun' and load them into Malaysian lorries. He identified the appellant as the driver of the lorry. He said the appellant was alone. He confirmed that the lorry driven by the appellant was empty. He then loaded those boxes into the lorry. Learned counsel argued that the presence of Li in court was very important otherwise the chain of circumstances was broken. According to learned counsel, the lorry was open to access to others and that it was the prosecution's duty to exclude this possibility. He further argued that the learned JC had overlooked this aspect in his evaluation process and had the learned JC conducted maximum evaluation, his attention would have captured this weakness in the prosecution's case.

[15] In considering this head of the appellant's complaint, we had closely scrutinised the judgment of the learned JC. A scrutiny of the judgment of the learned JC, revealed that he had considered and judicially appreciated the point raised by learned counsel before coming to a definite finding of fact that the appellant had complete custody, control and responsibility over the lorry and that the appellant had the required knowledge about the cannabis found hidden in the cargo compartment of the lorry. In the words of the learned JC:

A Dadah ganja di dalam kes ini dijumpai di dalam lori tersebut. Ong Boon Hua, SP9 ialah pengurus dan rakan kongsi syarikat pengangkutan Lee Hang Chan Trading di Bukit Mertajam. OKT adalah pemandu lori tersebut dan bertanggungjawab yang penuh ke atasnya. Lori tersebut disimpan di rumah OKT, jika tidak digunakan. OKT tidak dibekalkan dengan kalendan/pembantu oleh
B syarikat Lee Heng Chan Trading.

Yusof bin Mat, SP10 mengatakan lori tersebut tiada membawa apa-apa muatan ketika datang di Padang Besar sebelah Thailand. Menurut SP10 lagi, OKT datang seorang diri. Setelah lori
C tersebut diisi penuh dengan kotak-kotak bihun, OKT sendiri yang menutup kain tarpan dan memandu lori tersebut keluar dari kawasan itu. Tiada sesiapa bersama-sama OKT pada masa itu.

Rosli bin Hussin, SP5 memberitahu bahawa ketika di Kompleks Kastam Thai di Padang Besar sebelah Thailand, OKT memandu
D lori tersebut seorang diri. Tiada orang lain bersamanya.

Dari keterangan-keterangan SP5, SP9, SP10 di atas menunjukkan lori tersebut pada masa yang material dan pada masa-masa sebelumnya adalah sentiasa berada di bawah kawalan (control) dan jagaan (custody) OKT.

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Seterusnya keterangan pihak pendakwaan menunjukkan OKT di antara lain, mengaku dia membawa dadah ganja di dalam lori tersebut ketika disoal oleh SP6. Ini menunjukkan OKT mempunyai pengetahuan tentang dadah tersebut.

F **[16]** Moreover, the defence never suggested to SP10 that a third party could have placed the offending drugs in between the boxes in the cargo compartment of the lorry, without the knowledge of the appellant. On the facts of the present case, we therefore found the complaint of learned counsel lacked merit.

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[17] It is also clear from a reading of the judgment of the learned JC that he had critically appraised the defence that the appellant did not have any knowledge about the cannabis. In this regard, the learned JC had this to say:

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Oleh itu amatlah sukar untuk mempercayai atau untuk mengatakan bahawa OKT tidak tahu bagaimana dadah itu berada di dalam lori tersebut yang dipandunya kerana OKT yang mempunyai kawalan dan penjagaan ke atasnya dan inferen yang kuat bahawa OKT mempunyai pengetahuan, kawalan, penjagaan dan milikan ke atas
I barang-barang yang berada di dalam lori tersebut termasuk dadah ganja. Adalah tidak munasabah orang lain yang menganiayakan

OKT dengan menyembunyikan ganja di dalam lori tersebut dengan kuantiti yang sangat banyak yang mempunyai nilai yang tinggi.

Berdasarkan keterangan SP10 yang tidak dicabar tidak mungkin ada orang lain yang boleh memasukkan dadah ganja ke dalam lori tersebut semasa pemunggahan seperti yang ingin dicadangkan dalam pembelaan OKT kecuali kemasukan dadah ganja tersebut melalui perbuatan dan pengetahuan OKT sendiri kerana selepas kotak-kotak bihun dimuat oleh SP10, OKT terus mengambil alih kawalan dan jagaan lori tersebut sehingga lori tersebut diperiksa oleh Kastam Malaysia dan diimbas (scan) oleh Kastam Pencegahan yang diketuai oleh SP6.

[18] In our judgment, the totality of the evidence and the surrounding circumstances when taken together irresistibly point to the appellant having knowledge of the offending cannabis contained in the five plastic bags, which were hidden in between boxes in the cargo compartment of the lorry at the material time.

[19] We found the conviction of the appellant to be a safe one. We had, therefore, dismissed the appeal. We affirmed the conviction and the sentence of death imposed by the learned JC upon the appellant.